UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GODDARD RIVERSIDE COMMUNITY CENTER

and **Case Nos. 2-CA-39604**
2-CA-39928

LOCAL 74, UNITED SERVICE WORKERS UNION, IUJAT

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DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in New York City on May 23 and 24, 2011. The charge and the amended charges in 2-CA-39604 were filed on December 1, 2009, January 20 and July 10, 2010. The charge in 2-CA-39928 was filed on May 12, 2010. The Complaint, which was issued on December 30, 2010 alleged as follows:

1. That on July 1, 2009, the respondent unilaterally changed the health insurance plan from a health maintenance organization (HMO) to a health reimbursement arrangement (HRA).

2. That on July 1, 2009, the respondent unilaterally and without bargaining or offering to bargain with the union, (a) increased deductibles for individual and family coverage and (b) increased upfront payments by employees for prescription drugs.

3. That on July 1, 2010, the respondent unilaterally and without bargaining or offering to bargain with the union, (a) reduced deductibles; (b) reduced out-of-pocket maximum payments for individual and family coverage; (c) added a co-pay for preventative care and physician/specialist services; (d) added a co-pay for emergency room visits; and (e) increased coinsurance.

4. That on January 5, 2010, in Case No. 2-RC-23435, certain employees employed by the respondent at Capitol Hall, located at 166 W. 87th Street and 140 W. 140th Street voted to select the union as their collective bargaining representative.

5. That as a result of the foregoing election, the Regional Director, On March 16, 2010, issued a substituted Certification of Representative pursuant to which she merged the two units by adding the Capital Hall employees to the previously recognized unit.

6. That notwithstanding requests by the union for bargaining, the respondent, between January 5 and early April 2010, has refused to bargain with the respondent regarding the Capital Hall employees.

7. That despite agreeing to meet with the union regarding the Capital Hall employees on April 13, 2010, the respondent has (a) refused to consider proposals submitted by the union and (b) refused to offer counter-proposals.

8. That the respondent has failed and refused to bargain in good faith.

In relation to the alleged unilateral changes in health insurance, the respondent contends, *inter alia*, that pursuant to the terms contained in multiple successive contracts, the employer had agreed to provide to the represented employees the same health insurance benefits that it has provided to its non-union and managerial employees. It contends that over the course of many years, it has often changed the insurance carriers and the various benefits and/or co pays without objection by the union. Thus, the respondent contends that its most recent changes are consistent with its long standing prior practice and therefore cannot be construed as unilateral changes.

As to the refusal to bargain allegations, the facts show that in January 2011, a separate group of employees voted in a Board conducted election, to be represented by the union *and* also voted to be added to the existing collective bargaining unit that already was represented by the union. The respondent contends that notwithstanding the Board's certification on March 16, 2011, it had already been bargaining with the union for a considerable period of time before the certification and that a valid impasse was reached soon after the Certification was issued. The employer contends that because this group of employees voted to be included in the existing bargaining unit covered by an existing contract covering employees with substantially the same types of jobs, the scope of bargaining for this new group should be substantially reduced. The respondent argues that given these circumstances, it has met its obligation to bargain.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed, I make the following

Findings of Fact

I. Jurisdiction

The Parties agree and I find that the Respondent is an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

(a) The alleged unilateral changes in medical insurance

In my opinion, there are few disputed issues of fact and much of the evidence in this case is embodied in various letters, e-mails, contracts and notices that have been received as exhibits.

Goddard Riverside Community Center is a not-for-profit corporation that operates as modern settlement house that provides housing and a variety of social services. It has been in existence in one form or another for over a hundred years. It operates about 27 programs and provides services for around 17,000 people.

A significant portion of the employer's work force is unionized and in this respect it maintains collective bargaining relationships with six different unions including Local 74, the

charging party in this case. This union was certified as the representative for a group of about 50 employees in 1990 and the first contract was reached on February 12. 1991. That contract had a term that ran from 1989 to 1992. Article XX of that agreement reads as follows:

> Health and Hospitalization Insurance
> Full-time and regular part-time employees and their eligible dependents will be covered by the Agency's Health and hospitalization group insurance plan.

This language in the contract has continued in all subsequent contracts albeit there was additional language that was added and will be discussed below. In addition, the initial contract and all subsequent extensions have contained grievance and arbitration provisions.

At the time that the original contract was executed, the respondent had been purchasing health insurance that covered, for the most part, its managerial and supervisory employees. And instead of negotiating for a separate plan, the parties agreed to have the bargaining unit employees covered by the existing plan that covered the other non-union employees. There is, however, nothing in the contract which purports to freeze the "company plan" as it then existed and in this respect, the evidence shows that over the next several years, the company has modified the health care insurance provided to its employees by changing insurance carriers and/or by changing contribution levels and benefits. In this respect, the use of the words "company plan" is somewhat misleading since the insurance provided by the respondent has never been a plan that it set up and administered. Rather, it is whatever plan that it purchased in any given year from one or more outside insurance carriers.

Although the record does not indicate whether any changes were made in relation to medical insurance benefits from 1990 to 2002, the record shows that from 2002 through 2009, there were numerous and substantial changes, on almost an annual basis, in the medical insurance purchased by the company. This, no doubt was caused in part by the explosion of medical costs locally and nationally during this period of time and the concomitant need for organizations to meet the costs of providing medical insurance for their employees.

In April 2002, the Company made changes to its health plan and advised the covered employees of these changes in a memo from Stephan Russo dated April 16, 2002. This stated in pertinent part:

> As you know, I held a meeting today with approximately 70 staff people to discuss the fact that Goddard Riverside is facing a significant increase in the cost of health insurance…
> While we are committed to maintaining our current level of health coverage to employees and their families, we must find a way to pay for these increases. We are considering several options, including increasing the contributions made by employees… and/or increasing co-pay for services….
> We are also looking at ways to cut costs, including asking employees who have other health coverage for themselves and/or their family to voluntarily remove themselves from our insurance with the understanding that they could get coverage in the future if they need it.

On May 3, 2002, the staff was advised via a memorandum from Russo that there would be certain changes in health insurance starting on May 1, 2002. This notice stated that health insurance and current benefit levels from HIP and Aetna would continue to be offered and that dental coverage from Cigna would also be continued. However, the employees were notified that although there was no change in co-pays, employee contributions to the plan would be

substantially increased and that such payments would be deducted from their salaries. (In this instance, the amounts of the employee contributions depended on the type of coverage option chosen, [1] and the employee's salary range).

It is undisputed that the union was not invited to bargain over those changes. It also is undisputed that the union, after the fact, did not seek to bargain over the changes. Nor did it process any grievances regarding these changes. And although the union was not directly notified of the changes, the company's notice was openly made to all staff covered by the health plan and it is unlikely that the Union's officers and representatives were not aware of these changes either before or after they were made.

In 2003, the Company made further changes in its health insurance offering and these are referenced in a notice to the staff dated June 18, 2003. This stated in pertinent part:

> Effective July 1, 2003, we will be making the following changes to our health insurance coverage:
>
> Eliminate HIP as a health insurance option. All staff will be covered by Aetna US/Healthcare and Cigna Dental.
> Increase Aetna office visit co pay from $2/visit to $5/visit
> Increase Specialist office visit co pay from $0/visit to $5/visit.
> Increase Emergency Room co-pay from $15/visit to $35/visit.
> Increase Prescription co pay from $2.50/prescription to $5 generic, $10 preferred brand, and $25 non-preferred brands.

By memorandum dated June 19, 2003, the employer notified the covered employees, including those represented by Local 74, that the Finance Committee of the Board of Directors approved the 2004 budget and that the employer would be implementing the health insurance changes described above effective as of July 1. Employees who had previously been covered by HIP were urged to attend presentations and complete enrollment forms for Aetna and Cigna. I note that the employee contributions were not changed.

As was the case in the preceding year, the union was not given notice of these changes and the company did not offer to bargain about the changes. Neither did the union seek to bargain about the changes after they were announced and did not file any contractual grievance about the changes.

In June 2004, the parties engaged in negotiations for a new contract. During those negotiations, (and for some period of time before they started), the parties had discussed the idea of moving the Local 74 employees from the employer's existing health insurance to the union's health plan. This was viewed with sympathy by the respondent because at the time, it was believed that the union's plan would require lower contributions by the company.

At bargaining sessions held on June 16 and 25, 2004, the union's representative Sal Alladeen stated he was withdrawing for the present, the idea of transferring the employees to the union's plan and instead wanted the company to agree to keep the Aetna plan and eliminate all employee contributions. The employer rejected this proposal. The union also demanded that there be bargaining over any future changes in health insurance and the employer's

[1] Employees could choose among four options; single employee, employee plus child, employee plus spouse and family coverage.

position was that because this plan mostly covered non-union employees, it reserved the right to make changes as needed without the necessity of bargaining. [2]

In any event, the 2004 negotiations ended up with no change in the basic language of Article XX, except that Article XX was amended to reflect that the parties agreed that either side could, at any time before June 30, during any contract year, reopen Article XX for the purpose of bargaining about the transfer of the Local 74 represented employees from the company's insurance into the union's plan.

In the meantime and while bargaining was being held, the employer announced changes for 2004. The notice dated June 18, 2004 states *inter alia*;

> As you are probably aware, health insurance costs continue to rise at an alarming rate… We recently received the Aetna medical and Cigna dental renewal notices which indicated a substantial increase in monthly premiums…
>
> As it is our desire to maintain the high quality health insurance coverage we have been providing, effective July 1, 2004, we will be implementing a benefit change to our Aetna medical program and we will be replacing the Cigna dental plan with a dental plan offered by Aetna without increasing employees contributions for ether the Aetna Medical plan or the DMO Aetna dental plan. These plans will increase Goddard Riverside's health care premiums for employees covered by these plans in excess of 11%.
>
> * * *
>
> AETNA MEDICAL
> The benefit change is a follows:
> The prescription drug co-pays will be changing from $5 generic/$10 preferred brand/$25 non-preferred brand to: $5 eneric/$15 brand.
> With this 2-tier co pay structure, you will be charges a $5 co pay for a generic prescription and $15 for any brand name prescription. There is no longer any distinction between different types of brand name drugs.

The union was not invited to bargain about these changes, albeit the record shows that the subject, including reference to prescription drugs was a topic during the contract negotiations. As already indicated, that Employer's position during those negotiations was that this was an insurance plan covering mostly non-union employees and that it reserved the right to unilaterally make changes as needed.

By memorandum dated June 17, 2005, employees were notified that new changes were going to be made. These changes were that employees who used out-of- network doctors were

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[2] The 2009 version of the personal policies manual states at page 31:

> The health plan commences on July 1. The Agency reserves the right to make plan changes and to amend, eliminate, or reduce plan benefits during a plan year. Before each July 1, employees will be notified of any plan changes becoming effective that July 1 and will be given the opportunity to elect coverage for the new plan year.

In the earlier manual, in effect in 1993, it stated that "as changing health insurance costs dictate, the agency may substitute different coverage for above with consultation with staff before the change is made."

going to have to pay the first $5000 and that some of the higher salaried employees would have to pay higher contribution by way of payroll deductions.

The union was not invited to bargain about these changes. By the same token, the union did not ask to bargain about the changes and did not invoke the contract's grievance/arbitration procedure.

No changes were made in 2006.

By memorandum dated June 27, 2007, employees were notified that changes were going to be made to the insurance plan. The co-payment for specialist visits was increased as well as the co-pays for prescription drugs. Additionally, employee contributions were increased.

Neither Local 74 nor UAW 2320, another union representing a different group of the respondent's employees, were invited by the Employer to bargain about these changes. Nor did the Local 74 ask to bargain about the changes or invoke the grievance/arbitration procedure.

The story, however, is different for the employees who were represented by the UAW, which filed a grievance. In that grievance, the UAW alleged that the changes violated their contract because the changes were unilaterally made. That grievance went to arbitration and the arbitrator agreed with the UAW, basing her decision on the particular language in the UAW contract that required union consent to changes even if they resulted from the unilateral action of the insurer. As a result, the employer was ordered to maintain co-pays at pre-July 2007 levels and to reimburse UAW represented employees for any losses as a result of the change. I note that the UAW situation is distinguishable from that of the charging party because the contractual provisions are different. There is nothing in Local 74's contract that contains the same constraints on the employer as was contained in the UAW contract.

Local 74 and the employer commenced bargaining for a new contract in June 2008. In relation to the topic of health insurance, Alladeen's testimony was that he demanded that no changes be made to the health plan and that Rosenfeld's response was "the plan is the plan." Rosenfeld's version is that Alladeen asked that no changes be made and that he rejected that proposal. In either version, the evidence does not support any conclusion that Rosenfeld agreed to maintain health insurance in its then current state without further change. When the parties reached an agreement to extend the collective bargaining agreement to July 30, 2012, they also agreed to add a provision to Article XX which set up a flexible spending account so that employees covered by the insurance plan could use pre-tax earnings to pay for certain out of pocket health care costs not reimbursable under the existing health insurance. Otherwise, the language of Article XX remained the same and contained the provision permitting the parties to reopen the contract to bargain about transferring Local 74's members to the union health plan.

In May 2009, the company was faced with further proposed premium increases from it insurance carrier and also with other budget issues. As a result, Salvatore Uy, its Associate Director, communicated with its insurance broker about ways to reduce health insurance costs. After a series of discussions, the Board decided to chose the option of substituting the existing plan with another Aetna Plan which would raise the deductible for single members to $1500 per employee and $3000 per employee for family coverage. This was adopted by the Board with the caveat that the amounts that employees would actually be responsible for would be $750 and $1500 per year because a fund was set up with the carrier to reimburse employees for those amounts. In any case, this would be a very large increase in the amounts of money that employees would be forced to pay for medical services in the event that they got sick or injured during the plan year.

Although the UAW was given advance notice of these changes, Local 74 was not. And although there is some dispute as to exactly when Local 74 was notified of the change, (either in May or June), there is no dispute that whatever the date, Local 74 was notified of a fait accompli and was not given an offer to bargain about the changes.

There is a dispute as to when Local 74 was notified of the proposed changes for 2009. The company asserts that notice of the change was faxed to the union on or about May 29, 2009 which would be more than six months before the unfair labor practice charge was filed. The union asserts that it never received the alleged fax and did not learn of the change until after June 2, 2009, which would be within the 10(b) statute of limitations period. In this regard, the union's business agent who is responsible for servicing the shop testified that he first heard about the changes from the shop steward after she had received some kind of notice from the employer. The first notice to employees about this change was via an e-mail dated June 2, 2009 which is in evidence as Respondent exhibit 13(a). This reads in part:

> This year… we are renewing our insurance coverage with Aetna. We are, however, moving from our current co-pay plan structure to a different kind of plan, called a health Reimbursement Arrangement (HRA). In order to best inform staff of the changes, and in order for you to ask questions, we have scheduled three separate meetings with Aetna and our insurance broker. We strongly encourage all staff to attend these meetings so that you can understand the new plan and ask any questions you may have.

In this regard, Uy testified that he faxed a notice of the changes to the union in May 2009. He admits that he doesn't have the fax cover sheet that would show the actual transmission and the date. He also says that he sent it by letter, but doesn't have a copy of a dated letter or any proof that it was received.

In light of the fact that a defense based on Section 10(b) is an affirmative defense, the respondent has the burden of proof as to the facts that it alleges would support its claim. *Chinese American Planning Council*, 307 NLRB 410 (1992). In this case, I conclude that the respondent has not met its burden and therefore I conclude that the charge in this case was timely filed.

On June 17, 2009, the respondent invited its employees to a town hall meeting to be held on June 22 to discuss changes in the insurance plan. Respondent Exhibit 13 (c) is an e-mail to the staff stating that the company has selected a "different plan, called a Health Reimbursement Arrangement" that would go into effect on July 1, 2009.

Whether or not the union had any timely advance notice of the proposed changes, it is clear that the employer's intention was to make the changes without bargaining as the evidence shows that the employer consistently had taken the position that it had no obligation to bargain regarding changes in this medical insurance.

The union did not file a contract grievance as to these changes and did not file an unfair labor practice charge on this subject until December 1, 2009. (Barely within the 10(b) period). It did, however, meet with employees to see how many would like to transfer into the union's health plan. To this end, it set up an election so that its represented employees could vote on this question.

In October 2009 it seems that the parties agreed to put the Local 74 people into the union's health plan. Respondent exhibit 15 is a document that contains that agreement and it was executed by Russo. It provides for a schedule of employer monthly contributions to be made on behalf of each employee depending on what option an employee selects. (Single or family coverage).

This agreement, however, was subject to an employee ratification vote which apparently never happened. So the contract modification never went into effect.

On November 4, 2009, the Company filed an unfair labor practice charge against the Union in 2-CB-22304. (A complaint based on that charge was issued on June 25, 2010 and presumably was settled). This alleged that pursuant to the Article XX agreement to reopen for health plan transfer, the union had failed to provide the employer with certain information.

On May 26, 2010, the company sent an email to Dempsey regarding planned changes for the health insurance plan. This stated:

> Dear Chris: This is advance notice of the changes in the health plan that the agency is planning to make effective for the fiscal year July 1, 2010 to June 30, 2011. I've attached a chart comparing last year's plan to this year's plan. We intend to inform the program directors of these changes tomorrow, May 27 and we are holding open enrollment meetings the first week in June…

As in 2009, the company's intention was to introduce changes without bargaining with the union. Thus, the May 26 2010 notice was not an offer to bargain but rather a notice of a fait accompli.

By letter dated May 28, 2010, Alladeen requested information about the health/medical plan. In the last paragraph, he stated that "nothing in this letter shall be construed as an acceptance by Local 74 of the changes proposed… for July 1, 2010 to June 30, 2011 fiscal year. Local 74 reserves all legal and contractual rights and remedies it may have, including, but not limited to the right to bargain over any and/or all changes being unilaterally implemented…."

On June 8, 2010, the union filed a grievance alleging that the Company unilaterally changed the terms and conditions of the contract and violated Article XX "by implementing a health plan not provided for under the contract."

By an e-mail dated June 10, 2010, the company responded and rejected the grievance as being untimely inasmuch as it was sent more than five days after notice of the changes had been given. There is no indication in the record that the grievance was processed further.

Uy sent a letter dated June 21, 2010 to Dempsey responding to the union's request for information. There is no contention in this case that the company has failed to provide relevant information.

On January 12, 2011, the company, by Russo, sent a letter entitled "Re: Settlement of disputes." This was offer by the company to transfer unit employees including the new group to Local 74's welfare plan and contribute $400/month for individual coverage and $1000/month for family coverage for the duration of the contract, plus one month upfront.

This then is how the matter stood at the beginning of January 2011. Further settlement discussions have not resolved the matter. The issue here is whether the company's changes in

2009 and 2010, to medical insurance coverage for employees represented by Local 74, constituted violations of Section 8(a)(5) of the Act because the changes were made without offering to bargain about them with the union.

Analysis

There is no question but that medical insurance, as a term and condition of employment, is a mandatory subject of bargaining. An employer is therefore required to bargain with a certified or recognized union regarding changes made to insurance issues that materially affect employees in the bargaining unit. *NLRB v. Katz*, 369 U.S. 746 (1962); *Laidlaw Transit Inc*. 318 NLRB No. 85 (1995).

In *Keeler Brass Company*, 327 NLRB No. 112 (1999), the Board held that the employer violated Section 8(a)(5) when it changed the health benefit coverage and dental coverage offered to employees without giving the union notice and an opportunity to bargain. The Judge noted that the changes were substantial in that employees were no longer given the option of joining one of several different HMOs but instead were offered a preferred provider plan which had different medical benefit coverage, different co-pays, different prescription coverage and different dental benefits.

In *Valley Counseling Services, 305 NLRB 959 (1991),* an employer changed the co-payments required from employees for a medical insurance plan provided by the company through an insurance carrier. The facts showed that the company approved the change shortly after the union won an NLRB election but before it was certified. The change was made because the carrier intended to double the price of the coverage and in order to reduce the increase somewhat, the employer, which was a non-profit social service agency, negotiated with the vendor to provide that the cap for employee co-payments would be raised. In commenting on the duty to bargain, the Judge noted that the obligation to bargain exists once the union won the election, (and not upon certification), and that it cannot be avoided because the decision to make the change was a wise one or one that the employer believed did not allow for a sensible alternative. Nor is the obligation to bargain excused by the fact that the employer was pressed for time, unless the employer could, which it did not do, show that the change was founded upon “compelling economic circumstances.”

In *Caterpillar, Inc. v. NLRB* (May 31, 2011), enforcing 355 NLRB No. 91, the D.C. Circuit enforced a Board decision holding that Caterpillar unilaterally implemented a "generic-first" drug program without bargaining. Caterpillar's program required employees to use a generic drug before a brand-name drug, unless they received specific direction from a doctor that the brand-name drug was necessary. Caterpillar argued that the program was neither a "material, substantial, nor significant" change and that it was consistent with past practice. The Court held that "the Board reasonably concluded that the program increased the costs to employees who exercised their discretion under the benefit plan to choose brand-name drugs and was thus a material, substantial, and significant change." The Court agreed that Union's past acquiescence in somewhat-similar changes to prescription drug benefits did not create a past practice that privileged implementation of the generic-first program. It noted that the acquiescence in prior changes did not waive its bargaining rights “for all time.”

It appears that before Local 74 was certified as the representative of any of the Respondent’s employees, the Company had a policy of purchasing health insurance for its managerial and supervisory employees on a yearly basis. It also seems clear that it maintained and notified those employees through its personal policy manuals that it reserved the right to modify any insurance plan that it purchased for their benefit.

When Local 74 negotiated its first contract with the Respondent back in 1991, it agreed that the employees in the bargaining unit would be covered by the same insurance as was provided to the respondent's non-union managerial and supervisory employees. Unlike the UAW agreement that specifically provided that no changes in medical insurance could be made without the consent of the UAW, the Local 74 contract contained no such provision.

Since Local 74 entered into a contract whereby it agreed that the employees it represented should be given the same medical insurance as what the respondent had previously purchased for its managerial and supervisory employees, and since that insurance was subject to change by the employer, (and the insurance carriers), this could mean that Local 74 understood that the insurance offered to the represented employees was not frozen in place as of the date that the collective bargaining agreement was executed. The union agreed that with respect to medical insurance, the employees it represented would be covered by the same terms and conditions that covered other non-union employees and the medical insurance provided to those other employees was subject to change at any time at the discretion of the employer. That this was the nature of the agreement, is evidenced by the fact that over an extended period of time, the employer has made regular and substantial changes with respect to insurance carriers, benefit levels, co-pays and employee contributions; all without consulting or bargaining with the union. And in all cases until 2009, the union did not seek to bargain about this series of changes, file any grievances challenging the changes, or file any unfair labor practice charges regarding these changes until December 1, 2009. To my mind, this is not simply a matter of acquiescence in prior changes, but constitutes evidence that that the parties understood that the terms of Article XX meant that the employer retained the right to make these kinds of changes on a unilateral basis.

I am mindful that in *United Hospital Medical Center*, 317 NLRB 1279 (1995), the Board held that the respondent violated the Act when it made certain changes in health benefits without offering to bargain. In that case, as in this one, the contract provided that the represented employees would receive the same coverage for medical services as other comparable non-union employees. Also in that case, the company had made various changes to its medical insurance including a change in the insurance carrier in 1988 and changes in 1990 regarding the administration of how health insurance claims were made. However, in neither case did those changes result in reduced benefits or increased costs to the employees. Not surprisingly, the union did not file any grievances under its contract. It was only when the employer increased employee contribution levels that the Union raised a fuss. Thus, when the company unilaterally made changes in late 2003 that increased employee contributions, the union filed an unfair labor practice charge. In finding a violation, the Board sustained the Judge's rejection of the respondent's argument that a "waiver" had been established by virtue of "the Union's past conduct in not objecting to other more drastic changes in the medical plan…" Citing *NLRB v. New York Telephone*, 930 F.2d 1009, 1011 (2d Cir. 1991), that bargaining history and past practice may establish a waiver, the Judge noted that the respondent failed to establish that the union "consciously yielded" its bargaining rights. He also noted that even if the union's past actions may be perceived as consent, "a union's acquiescence in previous unilateral conduct does not necessarily operate in futuro as a waiver of its statutory rights under Section 8(a)(5)."

In comparison to *United Hospital Medical Center*, supra, the Board, with Liebman dissenting, reached the opposite result in *Courier-Journal*, 342 NLRB 1093. In that case the contract also contained a provision whereby the represented employees would receive health insurance on the "same terms as are in effect for employees not represented by a labor organization" and that "any changes…in such plans shall be on the same basis as for non-

represented employees." The difference between the two cases, (apart from the composition of the Board members), was that there was a "longstanding practice" (10 years), of making changes in costs and benefits of the health care program. As the Board stated; "The significant aspect of this case is that the union acquiesced in a past practice under which premiums and benefits for unit employees were tied to those on non-unit employees."

It seems to me that the facts in the instant case fall somewhere between those in the two cases cited above and do not unambiguously fall on one side or the other. But on balance, I think that the facts are more like those in *Courier-Journal* than in *United Hospital*. Thus, although the issue seems to me to be very close, and although there is no doubt that the medical insurance changes made in 2009 and 2010 were substantial and material, I think that the parties had, by the terms of their contract and by long standing practice, effectively agreed that the respondent had retained the right to change the medical insurance it purchased and to change, (after negotiations with the insurance carriers), the terms of the purchased medical and dental policies. [3] That is, I think that it can be said that the union, by its conduct from 2002 to 2008 had "acquiesced" to the Respondent's "right" to make the same changes affecting the union employees as it made for its managerial and supervisory employees. [4]

I therefore shall recommend that this allegation of the Complaint be dismissed.

(b) The alleged refusal to bargain with respect to the employees who were added to the unit

In 2009 Local 74 signed up a group of eleven individuals who are employed by the respondent in similar jobs as the employees who have historically been represented by this union. (These employees worked at other locations than where the represented employees worked).

It is the company's position that it initially agreed to recognize Local 74 for this group of eleven employees as an accretion to the existing bargaining unit and that that they should be covered by the existing contract. The union takes the position that recognition was not given but does concede that there were discussions with the company, commencing in October 2009, about this group including discussions about their terms and conditions of employment.

In Case No. 2-RC-23435, the union filed a petition seeking to represent employees who worked at 166 West 87th Street and at 140 West 140th Street. (These employees are referred to by the parties as the Capitol Hill employees). Pursuant to a Stipulated Election Agreement, an election was held on January 5, 2010 and a majority of these employees voted to select the

[3] I also note that unlike either of the cited cases, the Respondent in this case has offered, (and apparently continues to offer), to transfer the union employees from its medical insurance to the Union's health insurance plan.

[4] I note parenthetically that it might be somewhat impractical to require an employer to bargain first with a union regarding a segment of the employees covered by a purchased health insurance plan and then go to the insurance carrier to negotiate separate plans for each set of covered employees. In that circumstance and recognizing that insurance cost increases typically come from the insurance carrier which presents its bill at some point before the end of the contract term, and assuming that one could effectively negotiate with the carrier separate plans for each group of employees, the result would likely be to negate the provisions of Article XX that calls for a single uniform medical insurance program to cover the union and non-union employees of the company.

Union as their collective bargaining representative *and* to be included into the existing bargaining unit.

On January 5, 2010, Local 74 requested dates for bargaining so that the parties "can start negotiations on a contract for the two new Union sites…"

On January 6, 2010, Uy wrote to Dempsey stating *inter alia*; "As you know, the election has not yet been certified by the NLRB. Once we receive notice of the certification, we will be in a position to respond to your request…."

On January 13, 2010, the Region issued a Certification of Representative stating that the Union had won the election and that the two sites constituted an appropriate unit.

On January 14, 2010, the respondent's counsel wrote to the Region and requested that Certification of Representative be replaced with a Certification of Results. Citing *Federal Mogul*, 209 NLRB 343 fn 8 (1974), Mr. Rosenfeld stated that the Certification should reflect the fact that the unit was a voting unit and not "an appropriate unit."

By letter dated January 19, 2010, the Union requested dates to "start negotiations for the two new Union sites."

On January 20, 2009, Rosenfeld responded to the union's request by memo stating:

> Subject to issuance by the NLRB of a proper Certification of Results showing that these employees voted to be included in the existing bargaining unit, as we requested January 14, 2010, it is Goddard's understanding that the all-inclusive provisions of our 2008-2010 CBA – which covers all social service employees represented by Local 74…, but which does not contain separate terms applicable only to the employees at any particular site –can and should be applied to the new group of social service employees at the two new sites.
>
> All of the employees in the new group received a 3% pay increase effective Jan. 1, 2010, which deals adequately with any problem presented for those employees by the CBA's requirement to pay union dues as a condition of employment.
>
> With the cooperation of all concerned, the CBA can be applied to the new group, once there is a proper Certification of Results, effective the first month after you submit to Goddard proper union dues check off authorizations signed by the employees. Hopefully that will be Feb. 1, 2010.
>
> Alternatively, if you desire to meet, once there is a proper Certification of Results, please suggest a date, time and place.

On February 18, 2010, union agent Dempsey sent a letter requesting dates to start bargaining for the employees at the two new sites. In the letter, he threatened to pursue legal action if the company did not respond.

By letter dated March 16, 2010, the Regional Director wrote to the attorneys for both parties and stated:

> On January 13, 2010, a Certification of Representative was incorrectly issued in this matter. The enclosed document entitled Certification of Results of Election is the document which should have issued. Accordingly, the Certification of Representative is revoked and the enclosed Certification of Results of Election is being issued…

On March 31, 2010, the Union requested bargaining and asked for dates, times and locations.

The first (and perhaps last) bargaining session took place on April 13, 2010. (There was another meeting in October but that was probably a settlement discussion). Sal Alladeen testified for the union and Rosenfeld testified for the company. It seems that the union asked for wage increases for the new group for each of three years, over and above what was contained in the existing contract. The company's position was that unless the union could demonstrate that there was some difference between the job functions of the new people and the employees covered by the existing contract, the new group's wages and benefits should be the same and be the wage and benefits contained in the collective bargaining agreement. Alladeen testified that Rosenfeld wouldn't deviate and eventually walked out. [5]

By letter dated April 19, 2010, the union again asked for dates to continue the negotiations.

On April 22, 2010, Rosenfeld replied and stated *inter alia*:

> Starting October 23, 2009 – the same day that Goddard agreed to recognize Local 74 as the representative for these 11 previously unrepresented employees on the basis that a majority of them had signed Local 74… cards – Mr. Alladeen has proposed for them a 3% wage increase and transfer into the Local 74 Welfare Plan. He has been at it off and on ever since, at face to face meetings and in countless telephone calls, most recently at the attempted bargaining session held April 13, 2010… That session quickly degenerated as so many prior contacts with Mr. Alladeen have, into non-stop abuse from his side of the table… Mr. Alladeen's hostility makes bargaining futile.
>
> It has been Goddard's understanding since the outset of bargaining last October, (A) that the 11 Capitol Hall and 140th street social service team employees (three of whom transferred into their jobs from positions at one or another of the nine sites already covered by the collective bargaining agreement) share a community of interest with the Local 74 represented employees at those other sites, and (B) that the 4 year CBA covering those employees at the other sites,… would be applied to the 11, including, of course, its July 1 wage increase provisions. I asked at the April 13 meeting why the 11 should be treated differently. No reason was given. They belong in the existing bargaining unit under the existing contract. The two sides are still, I recognize, at impasse on this matter, as we have been for months.

[5] Since it is clear that the company, in response to the union's demands, offered to include the group of eleven under the existing collective bargaining agreement, the General Counsel cannot claim that the employer made no counterproposals.

> At the April 13 meeting. Mr. Alladeen proposed, for the 11, a separate 3 year contract, to be effective the date … of the NLRB certification of results of the election that it had conducted…. He claimed NLRB support for this approach. The NLRB documents, however, show that the 11 were given the opportunity in that election to choose whether "to be included in the existing unit… already represented by Local 74 or to remain unrepresented…. Yes, the existing CBA does not "automatically" apply to the new group, but there is nothing different about their jobs compared to those of the rest of the Local 74 employee and neither of us could sensibly want to set a precedent of separate contracts for separate sites.
>
> Goddard has fulfilled its obligation to engage in bargaining for the new group and does not intend to meet with Mr. Alladeen for the duration. We still desire and offer to agree to apply the CBA to the new group just as we agreed last year to amend the CBA to include and cover the last new group (40 Exchange Place) added to the existing bargaining unit, without, I stress, any "interim" wage increase….

` As indicated above, except for settlement discussions, there has been no further collective bargaining regarding the eleven employees who were added to the bargaining unit pursuant to election.

It is the respondent's position that even before the election and the certification, it was willing to recognize the union as the representative of these eleven additional employees and apply the terms of the existing collective bargaining agreement to them. And in this regard, there is no dispute that since October 2009, almost 2 ½ months before the Board conducted election, the parties during their negotiations for a new contract covering the existing employees, have discussed what if any terms and conditions should be applied to the new employees if they were included in the existing unit.

There is a slight credibility issue between the union's representative and Rosenfeld as to the content of the discussions that occurred during these pre-election negotiations insofar as they dealt with the eleven additional employees. (The union's representative agrees that the parties did in fact discuss the wages and benefits of this group before the election was held). In this respect I am going to credit Rosenfeld who testified that he persistently took the position that the additional employees should be accreted to the existing bargaining unit and therefore as their jobs were essentially the same as those in the existing unit, the contract's terms and conditions should be applied to them. According to Rosenfeld, he maintained this position consistently from October, (before the election) to April 13, 2010 at the first and only bargaining session. He also testified that the union took the equally adamant stance, during multiple meetings and conversations from October 2009 to April 13, 2010, that the company should give the group of eleven, additional wage increases over and above what was agreed to for the existing unit.

Was this a valid impasse?

Analysis

In *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), the Board defined impasse as the point in time of negotiations when the parties

are warranted in assuming that further bargaining would be futile and where both parties believe that they are "at the end of their rope." In that case, the Board had found that the parties had not reached and impasse but the Court disagreed.

And in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969), enfd. 395 F.2d 622 (D.C. Cir. 1968), the Board enumerated some of the factors it takes into account in determining if the parties have reached impasse:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors in deciding whether an impasse in bargaining existed.

As noted in *Taft Broadcasting Co*., supra, one of the elements is the importance of the issue or issues that are in dispute. In this case, it is noted that the because the scope of bargaining involves only a smaller group of employees who were added to an existing bargaining unit by way of a Board Certification of Results, the essential issue would be to what extent should these employees be covered by the terms and conditions of the existing contract or to what extent should their terms be at variance with the contract's bargaining unit to which they have added.

In *Federal Mogul*, 209 NLRB 343 (1974), a *Globe* Election was held where a separate and relatively small unrepresented group voted to be included into a much larger bargaining unit. In that case the employer unilaterally applied the terms of the existing contract to the newly added group and the union protested that it had the right to bargain before the employer made the changes. The Board held that in those circumstances, the Employer was not entitled to apply the existing contract to the new group of employees who had been added to the unit via the Board's Globe election without offering to bargain. In pertinent part the Board stated at page 345:

> The dissent relies on *Lubbock Typographical Union No. 888, International Typographical Union, AFL-CIO (The Avalanche-Journal Publishing Company*), 196 NLRB 177. We believe that case to be distinguishable. The respondent union there was found not guilty of an unlawful refusal to bargain when it insisted on its position that the contract applicable to other employees in the unit should be applied to the newly added group of proofreaders, while at the same time offering to bargain about any amendments which the company might think appropriate for this special group. The company, however, took an equally adamant position that a wholly new and different contract be negotiated, but failed to make any concrete proposals. On those facts, the Trial Examiner recommended that the charges be dismissed and the Board adopted his recommendation. There, as here, the union sought to bargain for the Globed employees as part of the existing unit, but offered to negotiate a supplemental agreement with special terms covering them. In the instant case, however, the Respondent changed the terms and conditions of the setup men by unilaterally applying the existing production and maintenance contract to them *in toto,* before offering the Union any opportunity to bargain. We are not suggesting that the Respondent here was precluded from asserting, as a bargaining position, that the existing contract ought to apply and inviting, as did the union in *Lubbock,* any suggestions as to what specific modifications therein should be made. But until

> negotiations can be had as to the respective positions of the parties, Board precedent requires that no unilateral changes be made in the wages or benefits of the newly represented employees.
>
> Nor do we suggest that either party may adamantly insist to impasse upon a totally separate agreement so designed as to effectively destroy the basic oneness of the unit which we have found appropriate. It is in that light that the Trial Examiner in *Lubbock* questioned, but did not then decide, whether the "Company thereby, in effect, was proposing to sever the proofreaders from the composing room unit, and by a negotiating tactic annul the Board's Decision and Certification. ..." Neither do we need to reach that issue here, for the evidence in this regard will not support such a finding. While neither party appears to have qualified as a model of flexibility, it was the Respondent which unlawfully and unilaterally made changes in benefits and which then adamantly insisted, as a matter of *law,* that it did not have to bargain about any of those items. The Union's position, while an insistent one, was not tantamount to a rejection of a contract which would encompass all employees in a single unit; nor can its insistence upon discussing the retention of previously enjoyed benefits be deemed a tactic designed to annual the Board's certification by destroying the integrity of the single unit.
>
> Under these circumstances and for the above reasons, we, like the Administrative Law Judge, find that Respondent violated its obligations under *Section 8(a)(5) of the Act.*

In *UMass General Hospital,* 349 NLRB 369 (2007) the Regional Director conducted an *Armour-Globe* self-determination election among the employer's per diem EMT/Intermediates and EMT/Paramedics who had been excluded from the bargaining unit when the parties entered into their collective bargaining agreement. The Board stated:

> The Board has long held that, following a self-determination election whereby a new group of employees joins a unit already covered by a collective bargaining agreement, the Employer must bargain as to the appropriate contractual terms to be applied to the unit's new group of employees. *Federal Mogul Corp.*, 209 NLRB 343 (1974). We find that *Federal Mogul*, supra, properly balances the concerns of preventing unilateral application of contract terms to a group of employees who were not represented when the collective bargaining agreement was negotiated, on the one hand, and allowing for employee free choice, on the other.

These kinds of situations do not often arise and present a situation where although the Board requires good faith bargaining after a Certification of Results in a Globe type election, it also acknowledges that the scope of the bargaining should be more circumscribed that what one would normally expect after an election in which the Board certifies a union as the bargaining representative. This is because an election that adds a group of previously unrepresented employees to the existing collective bargaining unit and contract does not entitle either party to treat the new group as separate from the existing unit and does not entitle either party to insist that they be covered by a separately negotiated contract.

I do not believe that in this unusual type of bargaining setting, an employer's bargaining position to the effect that the terms and conditions of the existing contract be applied to the newly added group would be evidence, standing alone, of bad faith. As the employer's position was that the group of eleven worked at comparable jobs as the

employees already in the unit, its position that they should be paid the same and receive the same benefits, is clearly a reasoned one. Of course by the same token, there would be nothing in the law to prevent the union from arguing during negotiations, that the jobs were not comparable, or that for other reasons, the newly added group should be treated somewhat differently from the existing unit employees. Nor would the union be barred from engaging in a strike in furtherance of its demands. What neither could insist on however, is that they should comprise a separate bargaining unit covered by a separate collective bargaining agreement.

It seems to me that the General Counsel's argument boils down to the fact that there having been only one bargaining session after the Certification of Results, the employer was not entitled to declare an impasse. In this respect, the General Counsel, I think wants to start the clock on bargaining as of the date of the Board's Certification of Results, (March 16, 2010), and to forget about what happened before. [6]

If the April 13, 2010 bargaining session was the only time that the parties discussed the terms and conditions that would be applicable to the group of eleven, I would totally agree with the General Counsel's contention that no impasse could have been reached and that the respondent's termination of negotiations was not permitted.

The evidence indicates however that the parties had discussed these employees and the terms and conditions that they should have on numerous occasions from October 2009 during contract negotiations for the existing unit. Indeed, the evidence shows that the employer was willing to recognize the union as the representative of this new group without an election and that it wanted to have them covered by the existing labor agreement. During the negotiations for the existing unit, the employer on more than a few occasions, told the union that the group of eleven should be covered by the existing contact. As noted above, the union's representative agrees that the parties did discuss their wages and benefits even before the election was held.

So insofar as bargaining about the group of eleven, the clock did not in fact start on March 16, 2010. (Or on January 5 when the election was held). Bargaining regarding this group had been ongoing for quite some time and even before the election, the respective positions of the parties had crystallized. That the company's position was that the newly added group should be covered by the terms of the existing contract should not have come as a surprise to the union when they sat down on April 13; this was the position that the company had taken on numerous occasions during prior bargaining.

Given the precepts described in *Federal Mogul* which seems to limit somewhat the scope of bargaining in these peculiar situations and the fact that there had been a substantial prior period of actual bargaining as to the terms and conditions that should be applied to the group of eleven, it seems to me that an impasse was in fact reached on April 13. In my opinion, the positions of the parties had crystallized over a preceding period of time and that no compromise was likely.

[6] Although the General Counsel contends that the Respondent unduly delayed the commencement of negotiations, I don't think that this was the case. Although it is true that the election was held on January 5, 2010, the company's reluctance to commence bargaining was due to the fact that the Region's Certification was in error and was not corrected until March 16, 2010.

In light of the above, I conclude that the respondent has not violated the Act in this respect.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: [7]

ORDER

The Complaint is dismissed.

Dated, Washington, D.C., August 3, 2011.

_____
Raymond P. Green
Administrative Law Judge

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.